

# Finding fault with no-fault divorce

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It was a story from Mexico City that did the rounds in the media. At the end of September 2011, a city counselor introduced a reform to the civil code that would create two-year (read temporary) marriage licenses.<sup>1</sup> Certainly, this proposal sounded wrong to many. For traditionalists, it entirely changed the purpose of marriage. For progressives, it was severely unromantic. Understandings of what marriage is may differ, but the ideal that it is forever is almost universally accepted, like the diamonds women receive upon engagement. Or is it?

This two-year marriage proposal (at time of printing, it had not passed into law) rings a little cheap for most, like the extension of a Las Vegas quickie wedding that is dissolved immediately after the hang-over wears off. However, the reality is that Canadian law actually values marriage as a short-term prospect through no-fault divorce. The shift from “fault” to “no-fault” divorce ultimately created a dynamic whereby one unhappy spouse who wanted out—for any reason or no reason at all—could unilaterally do so simply by moving out, be it two months or two years in. The end result is that we speak idealistic words (“till death do us part”) on our wedding days, knowing full well that when the going gets tough, we can—and do—get going.

## **A BRIEF HISTORY OF CANADIAN DIVORCE LAW**

Federal divorce law was created in 1968. Prior to this point, provincial laws allowed for divorce with cause, typically adultery. Quebec and Newfoundland marked the exceptions where divorce could only be obtained by a private act of Parliament. The new Divorce Act of 1968 introduced the idea of general marital breakdown (think “we don’t get along anymore”) as grounds for divorce,

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1. Til 2013 do us part? Mexico mulls 2-year marriage. (2011, September 29). *Reuters*. Retrieved from <http://www.reuters.com/article/2011/09/29/us-mexico-marriage-idUSTRE78S6TX20110929>

alongside fault grounds (like adultery, abuse or desertion).<sup>2</sup> In 1968, in order to obtain a divorce, a couple had to live apart for three years.<sup>3</sup> But by 1985 Canadian divorce law would change again, this time to fully reflect no-fault grounds; divorce became available after one year of separation, no questions asked.

Some argue the introduction of no-fault divorce actually had little to do with fault or the lack thereof, and more to do with who decides. In a 2007 briefing titled *Does Divorce Law Affect the Divorce Rate?*, Canadian economics professor Doug Allen and American marriage advocate Maggie Gallagher assert that “under the older system, ‘faultless’ divorces could be informally obtained by a couple, but only by mutual consent.”<sup>4</sup> They go on: “The most significant practical legal change created by ‘no-fault’ divorce in grounds was that it licensed unilateral divorce: for the first time, one spouse could successfully petition for divorce over the objections of his or her spouse, without alleging any grounds.”<sup>5</sup>

Fault to no-fault? A more apt wording is that the law moved from mutual consent to unilateral divorce.

#### **COMMUNICATING THE CHANGES IN DIVORCE LAW**

This is not mere semantics. Public sentiment on whether we should return to fault grounds for divorce appears to be one of disdain. In an emotional time, why should I be forced to point fingers? “No-fault” suggests taking the high road. It may even suggest forgiveness. If both parties are equally to blame, which, in the average low-conflict divorce may be almost universally true, no fault can or should be found.

However, if what “fault” divorce means is that one person cannot decide alone, then there is a different implication. Suddenly, fault divorce offers something positive since it prohibits one party from stomping over the feelings of the

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2. Douglas, K. (Revised 2001, March 27). Divorce law in Canada. Law and Government Division, Government of Canada Publications. Retrieved from <http://publications.gc.ca/Collection-R/LoPBdP/CIR/963-e.htm>
  3. Marriage and divorce. In the *Canadian Encyclopedia* online reference. Retrieved from <http://www.thecanadianencyclopedia.com/articles/marriage-and-divorce>
  4. Allen, D.W., Gallagher, M. (2007, July). *Does divorce law affect the divorce rate? A review of empirical research, 1995-2006*. Institute for Marriage and Public Policy, iMapp Research Brief. Vol. 1, No. 1, p. 2. Retrieved from: <http://www.marriagedebate.com/pdf/imapp.nofault.divrate.pdf>
  5. *Ibid.*

other. And since 85 to 90 percent of Canadian divorces are deemed to be of the low conflict variety, working on a marriage should be at least as viable an option as divorce.<sup>6</sup>

Indeed, according to a 2011 study from the Institute for American Values, in about 40 percent of couples one or

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both partners were interested in reconciliation.<sup>7</sup> This is particularly noteworthy, since this survey was conducted at the tail end of the divorce process. Furthermore, a 2002 study published by the same institute showed two out of three unhappily married adults who avoided divorce or separation were happily married five years later; those who divorced were no happier than those who stayed married.<sup>8</sup>

That study highlights how one unhappy spouse may be the driving force behind divorce. The authors write: “Unhappy marriages were less common than unhappy spouses. Three out of four unhappily married adults were married to someone who was happy with the marriage.”<sup>9</sup> If divorce is pushed by one unhappy spouse, whose partner is happy—which, in a low conflict marriage means they have just as great a chance of being happily married five years later – then unilateral divorce simply makes it easy for the one unhappy partner to leave without explanation or negotiation.

There is another problem with the term “no-fault” divorce. Here we are discussing the majority of divorces, which are low-conflict. The reasons given for low conflict divorces are so universal over the course of years married that were everyone to divorce for these same reasons, we would have a 100 per cent divorce rate.

That said, there are high-conflict divorces, which include abuse and violence. Here, “no-fault” does no justice, since someone likely is—at fault, that is. The idea of a 50/50 split of property based on “no-fault”

principles is an injustice. The ability for an abused spouse to get out of marriage quickly was one of the compelling reasons for moving toward unilateral divorce. Yet there could have been ways of providing a safe escape from an abusive marriage without substantially altering—and detracting from—the entire institution.

No-fault laws were intended to decrease the acrimony of divorce; that has not been the result. Though an empirical study of how many acrimonious divorces existed pre-no-fault divorce as compared with after is impossible, the family law business is booming today.

In any case, the harms created by “no-fault divorce” now far outweigh those resulting from the small minority of cases where one partner was being abused. If the goal of no-fault divorce was to diminish abuse and acrimony, any family lawyer or judge will tell you much improvement remains to be desired.

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6. Stewart, R. (2001). The early identification and streaming of cases of high conflict separation and divorce: A review. Presented to the Family, Children and Youth Section, Department of Justice Canada. Minister of Justice and Attorney General of Canada, p. 15. Retrieved from [http://publications.gc.ca/collections/collection\\_2007/jus/J3-5-2001-7E.pdf](http://publications.gc.ca/collections/collection_2007/jus/J3-5-2001-7E.pdf)
  7. Doherty, W. J., Ward Sears, L. (2011). *Second chances: A proposal to reduce unnecessary divorce*. New York: Institute for American Values, p. 8. Retrieved from <http://www.americanvalues.org/pdfs/dl.php?name=second-chances>
  8. Waite, L.J., Browning, D., Doherty, W., Gallagher, M., Luo, Y., Stanley, S.M. (2002). *Does divorce make people happy? Findings from a study of unhappy marriages*. New York: Institute for American Values, p. 4. Retrieved from <http://www.americanvalues.org/UnhappyMarriages.pdf>
  9. *Ibid.*

## DIVORCE AND THE ZEITGEIST

Unilateral divorce reflects the zeitgeist of our age, one in which accountability and responsibility for one's actions are at an all-time low. In the short-term view of history, this new "anything goes" approach to life stems from the 1960s. As Amy Wax, a University of Pennsylvania Law Professor concerned about the demoralization of sexual and family life puts it: "I know it's a cliché to blame the 1960s. But I blame the 1960s."<sup>10</sup>

The iconic Woodstock photos of flower-clad folks smoking dope were emblematic of deeper societal change. Apathy (if not outright hostility) toward marriage was on the rise, as illustrated by Betty Friedan's famous 1963 book *The Feminine Mystique*.<sup>11</sup> It focussed on the unhappiness of housewives and compared women entering suburban married life to concentration camp prisoners. Such women, argued Friedan, were walking without protest to boring, unfulfilling lives evoking a sort of spiritual or intellectual death camp. A hardly less draconian vision of stay-at-home moms prevailed in public discourse.

Contrast this with the period before the late 1960s, when a more sacrificial view of marriage was the norm. Dr. Brad Wilcox, Director of the National Marriage Project at the University of Virginia, argues in a 2009 article in *National Affairs*: "Americans were more likely to look at marriage and family through the prisms of duty, obligation, and sacrifice...A decent job, a well-maintained home, mutual spousal aid, child-rearing, and shared religious faith were seen almost universally as the goods that marriage and family life were intended to advance."<sup>12</sup> This is far less the case today. Marriage would come to be viewed, not as a fulfilling moral obligation to spouse and

children through hardship, but rather as a nice add-on, a loving relationship that could end when it wasn't loving anymore.

Incidentally, this concept of marriage has led to other behaviours that are, arguably, more detrimental than divorce. In order to divorce, one must first wed, which at least implies a first attempt at stability for raising children. Increasingly, however, single mothers are birthing kids without ever seeking marriage. Today, in public policy debates, divorce is less of a concern than transient cohabiting relationships—those that result in siblings with multiple fathers.

Nonetheless, looking back at the 1960s, it is clear that no-fault divorce arose out of a basic change in our understanding of marriage. An institution which, until then, had been experienced as a bond to be maintained in good times and bad, even if only for the sake of children, would come to be seen as a casual agreement from which escape was perfectly possible and acceptable.

This, of course, had a very significant impact on the stability of the family.

## THE OUTCOMES OF NO-FAULT DIVORCE IN CANADA

### More divorce

In Canada, the changes made to marriage law in 1968 and in 1985 brought about an immediate increase in the number of divorces.

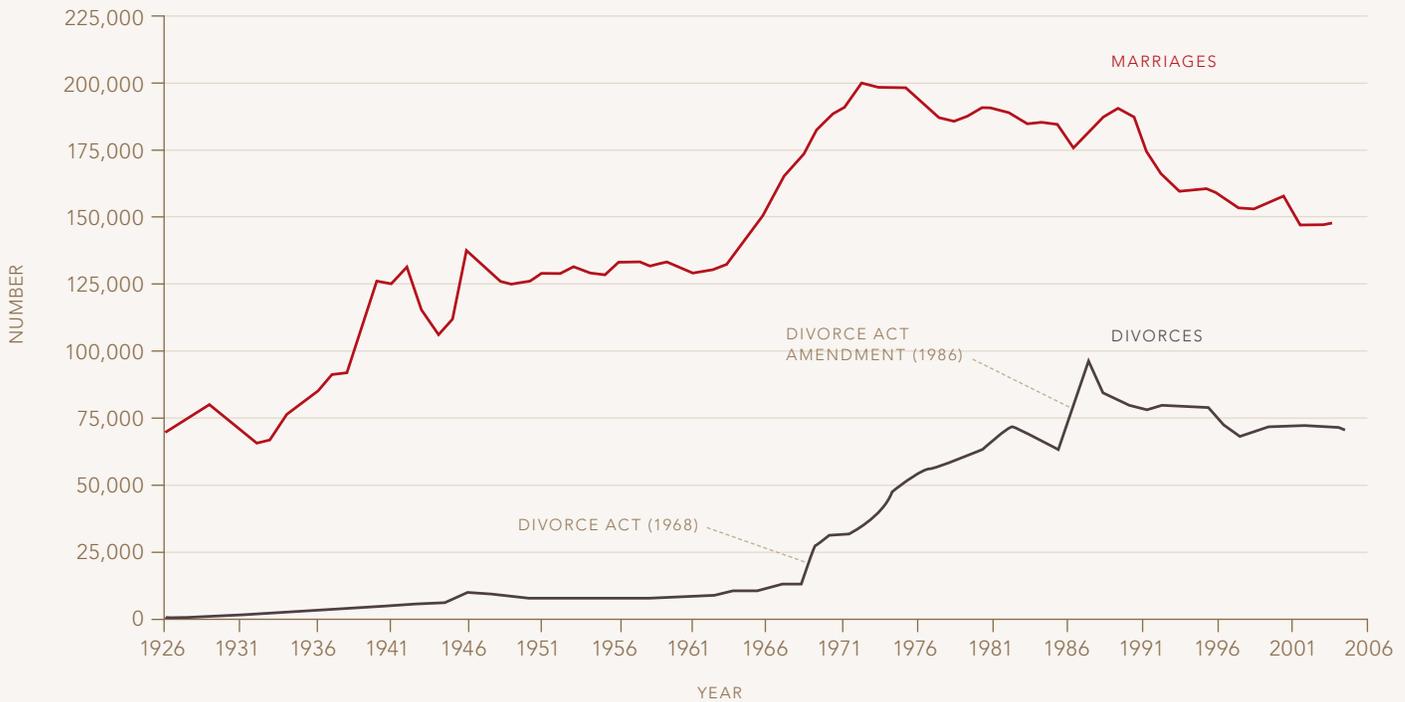
Prior to the legalization of unilateral divorce, the divorce rate inched upwards, sticking rather close to zero percent.

10. Wilcox, B.W., et al. (2011, August). *Why marriage matters*. New York: Institute for American Values. The exact quote comes from an event on video in the segment entitled *The Conversation* at <http://www.centerforpublicconversation.org/events/v/wmm-20110816.php>

11. Friedan, B. (1963). *The feminine mystique*. New York: W.W. Norton and Co.

12. Wilcox, B.W., (2009, Fall). *The evolution of divorce*. *National Affairs*. Retrieved from <http://nationalaffairs.com/publications/detail/the-evolution-of-divorce>

## Number of divorces and marriages, Canada, 1926 to 2004



Source: Statistics Canada, Demographic Analysis Section. (2008, July). Report on the demographic situation in Canada 2005 and 2006. Catalogue no. 91-209-X, p. 72. Retrieved from <http://www.statcan.gc.ca/pub/91-209-x/91-209-x2004000-eng.pdf>

Today, Statistics Canada estimates that roughly 40 percent of marriages that took place in 2008 will have ended in divorce by 2035.<sup>13</sup>

Canadian economist Doug Allen theorizes as to why an increase in divorce followed the legalization of no-fault divorce in a 1998 paper. In typical economic jargon he says that “the rise of no-fault divorce laws throughout the western world...is the result of a rise in the number

of inefficient marriages during the 1940s-1960s.”<sup>14</sup> He goes on to discuss how and why these marriages became inefficient, citing factors like women moving into the workplace and structural changes in the economy.

The conclusion of his assessment of divorce in Canada is that the move to unilateral divorce increased the probability of divorce. As he puts it, “inefficient divorces” increased, “where one spouse used the new law to the disadvantage of his or her partner.”<sup>15</sup>

13. Ambert, A. (2009, November). Divorce: *Facts, causes and consequences*. Ottawa: Vanier Institute of the Family, p. 4. Retrieved from [http://www.vifamily.ca/sites/default/files/divorce\\_facts\\_causes\\_consequences.pdf](http://www.vifamily.ca/sites/default/files/divorce_facts_causes_consequences.pdf)

14. Allen, D.W. (1998). No-fault divorce in Canada: Its cause and effect. *Journal of Economic Behaviour and Organization*, vol. 37, p. 129. Retrieved from <http://www.sfu.ca/~allen/nofaultCan.pdf>

15. *Ibid*, p. 145.

If we looked beyond the rhetoric of doing things ‘for the children,’ we would devote ourselves to working on low-conflict marriages, rather than placing trust in the hydra-like beast we still, beyond all reason, call ‘the good divorce’

#### A contractual approach to marriage

Another related outcome was the introduction of marriage as a legal contract, not unlike any other business partnership. Previously, marriage was a covenant, a communal act, a promise—and there was no contract in the world that could have outlined all the obligations, joys, duties and life idiosyncrasies that were involved. In a 2011 book titled *Family Politics*, political philosopher Scott Yenor highlights the many manners in which marriage is not, in fact, contractual:

Marriage is founded in consent; it forms a loving, mutually dependent relation that supersedes the point of view of contract. Consent leads to a transformation, for true marriage supersedes the more contractual, individualist rendering of reciprocity—‘I will do something for you if you do something for me.’... Whereas contracts spell out terms, marriages concern unforeseeable uncertainties that force the adaptation of plans for the relationship...The family is, for theoretical

and practical reasons, a communal institution; its members are unable to figure out where ‘mine ends’ and ‘yours begins.’<sup>16</sup>

#### Increased poverty

Yet another outcome of unilateral divorce is increased poverty. It is ironic that making marriage easier to exit, although justified largely in terms of women’s rights, led to a well-documented increase in poverty rates for women. Single mothers are identified as one of five critical risk groups for poverty today, alongside recent immigrants, the disabled, unattached adults aged 45 to 64 and aboriginals living off-reserve.<sup>17</sup> The 2006 Census showed that a whopping 35.9 percent of female single parent households lived below the Low Income Cut-off, as compared with 15.2 percent for male single parent households and only 8.6 percent for couple households.<sup>18</sup>

Family breakdown, which increased with the advent of no-fault divorce, is irrefutably responsible for increased poverty rates in Canada.

#### Early adulthood for children

Innocent children are undoubtedly the biggest casualty of our lackadaisical approach to marriage. In Canada, we pay lip service to the idea of doing things right “for the children.” However, we fail to acknowledge that, for children, the end of low-conflict marriages marks the end of the world and ushers them into a state of early adulthood by forcing them to cope with decidedly adult problems. Elizabeth Marquardt, a child of divorce herself and author of the *Between Two Worlds—The Inner Lives of*

16. Yenor, S. (2011). *Family politics*. Waco: Baylor University Press, pp. 267-268.

17. Taylor, P.S. (2007, November). Family poverty in Canada: Raising incomes and strengthening families. Ottawa: Institute of Marriage and Family Canada, p.3. Retrieved from [http://www.imfcanada.org/article\\_files/Family%20Poverty%20in%20Canada%20-%20Final%20-%20Hi%20Res.pdf](http://www.imfcanada.org/article_files/Family%20Poverty%20in%20Canada%20-%20Final%20-%20Hi%20Res.pdf)

18. Census of Population, 2006. *Number of persons under 18 years of age in after-tax low income families by family type and family employment status, Canada, 2005*. Statistics Canada. Retrieved from <http://www12.statcan.ca/census-recensement/2006/as-sa/97-563/table/t23-eng.cfm>  
For a bigger discussion of how family breakdown affects poverty in Canada, please see Walberg, R. and Mrozek, A. (2009, June). *Private choices, public costs: How failing families cost us all*. Ottawa: Institute of Marriage and Family Canada.

*Children of Divorce*, says the confusion a child experiences as a result of divorce can come down to something as simple as when to answer the phone.<sup>19</sup> She describes how, for one parent, you pick up the phone no matter when it rings, because the value at stake is being available to those who might be in need. For the other parent, you ignore the phone and let it ring in favour of enjoying dinner with the people around you at that moment.<sup>20</sup> Neither parent is wrong. But the child is forced to consider these conflicting values and remember to apply them correctly.

That anecdote doesn't even begin to identify the harms children experience, e.g. the need to emotionally support lonely and overworked parents, the insecurities

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associated with parents meeting new partners, the forced camaraderie with a new step family, the lack of attention from one parent or both, the increased risk of dropping out of school as a result of lack of concentration, the increase in problem behaviours (read bullying), the greater tendency to initiate early and inappropriate sexual encounters...the list goes on. Few would willingly introduce a five-year-old to geopolitical conflict, ("let's discuss the disintegration of Yugoslavia, shall we?"), but many are those who appear to have no qualms about

introducing a five-year-old to a disintegration of the most fundamental relationship he or she knows.

The negative effects of divorce on children are well-researched and close to unanimous. If we looked beyond the rhetoric of doing things "for the children," we would devote ourselves to working on low-conflict marriages, rather than placing trust in the hydra-like beast we still, beyond all reason, call "the good divorce."

#### **MARRIAGE AS A SOCIAL GOOD**

The biggest problem with unilateral divorce is that it fails to acknowledge the benefits to society of marriage.

There is no such thing as a private marriage—private couple relationships are called dating—and as a result, marriage is a communal affair, with implications for society.

There used to be societal, cultural, social and legal supports underpinning the special commitment of marriage as a privileged way of life.

Strong marriages in turn were the basis for strong, safe communities—the kind we all desire to live in.

No-fault divorce cast overboard the legal supports for marriage at the same time as cultural supports also waned. Glenn Stanton comments in his 1997 book *Why Marriage Matters*: "The law is a teacher. Currently, it is teaching us that marriage only matters if two people simultaneously want it to matter. If one party loses faith

19. Marquardt, E. (2005). *Between two worlds: The inner lives of children of divorce*. New York: Crown Publishers.

20. This anecdote is taken from a talk Elizabeth Marquardt gave at a conference for the Priests and Deacons of La Crosse, Wisconsin. It can be found at <http://ruthinstitute.libsyn.com/webpage/la-crosse-conference-on-divorce>

temporarily, the marriage can end. The law must teach that marriage matters, period.”<sup>21</sup>

Given that the conditions for marriage are devoid of any concrete support structures, societal or legal, the great surprise today is not that the divorce rate is so high, but rather that it is not higher.

### WHAT CAN BE DONE?

#### Education

Recommendations for rejuvenating the beleaguered institution of marriage start early. Surveys of kids in high schools show that the vast majority want to get married. So early education is a must. Children and teenagers need to be taught all the positive features of marriage, so they can realize that it involves both joy and hard work and, more importantly, remains the best way to raise children.

#### Counselling

Pre-marital counselling ought to be strengthened and broadened out beyond religious communities (where most pre-marital counselling takes places), so that every couple can benefit. Counselling in religious settings ought to be improved—few religious leaders have actual training in counselling. Finally, counselling should look toward restoration and reconciliation as a plausible first option (again, in low-conflict marriages).

#### The introduction of marriage mentoring programs

Enterprising individuals could create marriage mentoring programs for young married couples to learn from those who have weathered storms ahead of them. While divorce is very commonplace and problems in marriage

are ubiquitous, we fail to address those problems. One of these is a lack of community—something marriage mentors might attempt to address.

#### Non-legal solutions

A report titled *Second Chances: A Proposal to Reduce Unnecessary Divorce*, published in 2011 by the Institute for American Values, is quite creative as far as solutions go.<sup>22</sup> It suggests a notification document to inform a partner of serious problems in a marriage, problems that, without resolution, will lead to divorce. This avoids the first treacherous step into the legal system. Many divorces might be prevented simply by making one or both partners aware of the possibility of reconciliation and of the fact that that divorce does not bring greater happiness.

Of course, we could try and re-introduce fault grounds into divorce proceedings. However, there’s a bigger cultural struggle at play, and that is an uphill road. That marriage survives at all after the vicious assault of the past decades on the institution is testimony to the desires of individuals to be in true, lasting partnership with one another. In spite of years of feminist rhetoric that women are better off without men, in spite of the movement of the culture away from community and toward individualism, marriage still stands. We need to remind people how to live it—through good times and bad, “till death do we part,” just as the vows say, once again. 🍁

21. Stanton, G. (1997). *Why marriage matters: Reasons to believe in marriage in postmodern society*. Colorado Springs: Pinon Press, p. 172.

22. Doherty, W. J., Ward Sears, L. (2011).